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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-471

JOHN W. COLLIS, *Petitioner,*

v.

KENTUCKY BAR ASSOCIATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The petitioner, John W. Collis, respectfully requests that a writ of certiorari issue to review the judgment and opinion rendered herein on May 9, 1975, by the Court of Appeals of Kentucky.

OPINION BELOW

The opinion of the Court of Appeals of Kentucky, dated May 9, 1975, has not yet been reported in the South Western Reporter, 2d series. It is reprinted in the appendix hereto, p. 1a, *infra.*

The findings and recommendation of the Board of Governors, dated January 18, 1975, are not reported. They appear in the appendix hereto, p. 6a, *infra.*

The report, findings of fact, conclusions of law, and recommendation of the Trial Committee, filed on January 7, 1975, are not reported; they are reprinted in the appendix hereto, p. 9a, *infra.*

JURISDICTION

The petitioner, a licensed practicing attorney in Kentucky, was charged by the Kentucky Bar Association with six counts of unprofessional conduct. Following an evidentiary hearing before a Trial Committee and an *in camera* proceeding by the Board of Governors, the Court of Appeals of Kentucky made its own fact findings and conclusions, and ordered that the petitioner be "permanently disbarred from the practice of law" in Kentucky. Federal constitutional challenges to the procedure leading to such order were raised before the Court of Appeals and were therefore rejected by it, though its opinion does not expressly reject such claims. *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 67 (1928). See pp. 9-10, *infra.*

A timely petition for rehearing, which also raised federal constitutional claims, was denied by the Court of Appeals of Kentucky without opinion on June 27, 1975. See appendix hereto, p. 5a, *infra.*

This petition for writ of certiorari has been filed within 90 days from the order denying rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether, under the Due Process Clause of the Fourteenth Amendment, an intermediate advisory body in a state bar disciplinary proceeding must give the accused attorney an argumentative-type hearing, where that body has the final and unreviewable power to acquit the attorney of all charges but does not have any final power to convict or to impose sanctions.

2. Whether, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the highest court of a state must provide some sort of an evidentiary hearing to an attorney accused of misconduct, where that court has assumed the role of independent fact finder in disciplinary cases and has disregarded and given no weight to the facts found by a subordinate "advisory" body following an evidentiary hearing before that body.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Sec. 1:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rules of the Court of Appeals of Kentucky (RCA), 7 Baldwin's Kentucky Revised Statutes (1969):

RCA 3.300: The respondent against whom a charge has been filed shall have a right to be represented by counsel and entitled to a hearing before a Trial Committee. He shall have . . . the right to compel the attendance of witnesses; and the production of books, papers and documents or other writings. He shall have the right to an oral argument or to file a brief before the Trial Committee. He shall be afforded

a full opportunity to remain silent, to defend himself by the introduction of evidence and to cross-examine witnesses called against him. . . .

RCA 3.330: . . . The burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must be proven by a preponderance of the evidence. . . . Before submission the Trial Committee may direct such oral argument as it deems appropriate and receive briefs from all parties on such terms as it may impose. After submission of the case to the Trial Committee there shall be no further oral argument or briefing either before the Trial Committee or before the Board [of Governors].

RCA 3.360: When a disciplinary proceeding has been finally submitted, the Trial Committee shall promptly file with the Board the entire transcript of the proceeding, the transcript of testimony together with such briefs as may have been filed and a written report in the nature of findings of fact and conclusions of law, which shall contain a concise statement of: . . . (c) the facts which the Committee deems proven by a preponderance of the evidence, the Committee's conclusions; and (d) its recommendations as to the disposition of the case. The Trial Committee's report shall constitute a part of the record in the case. The report shall be advisory.

RCA 3.370: Upon receipt of the report of the Trial Committee the Board [of Governors] shall promptly consider and act upon the entire record. . . . The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found not guilty, the Board's action is final. If the respondent be found guilty, the Board shall then decide by a second roll call vote, the disciplinary action to be recommended. . . . If discipline is recommended the entire record . . . shall be filed with the Clerk. Any recommendation to the Court that disciplinary action be taken shall be advisory.

RCA 3.400: . . . After the Board has determined the guilt or innocence of the respondent and the discipline to be imposed by it or recommended to the

Court, no rehearing shall be permitted by the Board. . . .

RCA 3.410: Promptly upon the filing of the order as provided in RCA 3.370, the Clerk shall advance the case on the docket and shall forthwith issue a rule against the respondent returnable within twenty days . . . to show cause why he should not be adjudged guilty of unprofessional conduct and disciplined therefor.

RCA 3.430: If respondent timely files response it shall be supported by a brief and the Board shall have thirty days thereafter to file its brief.

RCA 3.440: Upon submission of the case the Court will enter such orders as it may deem proper. . . .

STATEMENT OF THE CASE

A six-count charge was filed against the petitioner by the Kentucky Bar Association, representing the integrated bar in that state. The six counts involved petitioner's transactions with four different unrelated clients, transactions that allegedly included commingling or withholding of the clients' funds and the issuance of certain checks to the clients that were returned for "insufficient funds." No charge was made that the petitioner in any way profited from these "unethical" transactions or that any of the clients suffered any pecuniary loss.

A. The Trial Committee hearing

A duly constituted Trial Committee, composed of three lawyers, conducted an evidentiary hearing on November 6, 1974. Both the petitioner and the Bar Association produced and examined witnesses and submitted documentary evidence on each count. By any standard, this hearing satisfied all due process requirements.

The Trial Committee found that the petitioner had committed technical violations of ethical standards as to each of the six counts. But in so finding, the Committee noted in each instance either that the "insufficient funds" checks were promptly made good, or that the delayed payments or collections were eventually delivered to the clients, or that the commingled funds caused the clients no difficulties or losses, or that the clients "lost no money" whatever. See pp. 9a-12a, *infra*.

The Trial Committee made no finding that the petitioner in any of these transactions acted fraudulently or with wrongful intent. For that reason and in light of the entire record, the Committee recommended that the petitioner "be given a [private] reprimand deemed proper by the Court of Appeals of Kentucky." See p. 12a, *infra*.[1] That recommendation was consistent with the Court of Appeals' action in *Kentucky Bar Association* v. *Jones*, 372 S.W.2d 794 (Ky. 1963), where the Court merely censured a lawyer who had carelessly, but not fraudulently, failed "to promptly distribute funds paid to him as an attorney for the purpose of distribution."

B. The Board of Governors' secret determination

Pursuant to RCA 3.360, the Trial Committee promptly transmitted to the Board of Governors, a body composed of 15 lawyers, the entire record of the proceedings before it, including the Committee's findings, conclusions and recommendations. But at this point, the petitioner was not served with, or otherwise made aware of, the Committee's findings, conclusions

[1] One of the Committee members was of the opinion that the recommendation should be that the petitioner "be given a public reprimand and censure by the Court of Appeals of Kentucky." See p. 12a, *infra*.

and recommendations—all of which were deemed "advisory" only under RCA 3.360.

The Board of Governors met secretly at the Hilton Inn in Lexington, Kentucky, on January 18, 1975.[2] Petitioner's case was one of numerous disciplinary cases considered at that *in camera* meeting. But, in accordance with RCA 3.370, petitioner was not entitled to appear at that meeting, either in person or by counsel. Nor, under RCA 3.330, was he entitled to file any brief or make any oral argument before the Board.

Under RCA 3.370, the Board had the power to find the petitioner not guilty of the charges, in which event, "the Board's action is final." It also had the power, if it found the petitioner guilty, to recommend that he be publicly reprimanded, suspended or disbarred.

Immediately after its consideration of petitioner's case, the Board, by identical 15-0 roll call votes, rendered (1) a "finding" that the petitioner "be adjudged guilty," and (2) a recommendation to the Court of Appeals that he "be permanently disbarred from the practice of law in Kentucky." See pp. 6a-7a, *infra*. Under RCA 3.400, the petitioner was not entitled to seek any rehearing or reconsideration of the Board's action. And under RCA 3.370 the Board's recommendation to the Court that disciplinary action be taken was deemed "advisory" only.

[2] RCA 3.370 expressly forbids anyone other than the members of the Board of Governors from being present during the consideration of disciplinary cases. Petitioner attempted to initiate discovery proceedings to determine if certain officers of the Bar Association, not members of the Board of Governors, were present at this meeting and extended ex parte influence on one or more members of the Board. The Court of Appeals rejected this attempt. See p. 1a, *infra*.

C. The Court of Appeals proceeding

Only after the Board had made its "finding" and recommendation was the petitioner made aware of the Trial Committee's report and recommendation. Thus on January 23, 1975, he received simultaneously (1) the Trial Committee's report and recommendation, (2) the Board's "finding" and recommendation, and (3) a summons to file a response in the Court of Appeals to a show cause order why he should not be adjudged guilty of unprofessional conduct and disciplined therefor. See p. 8a, *infra*.

The petitioner and the Bar Association did thereafter file briefs in the Court of Appeals, based upon the written record of the proceedings before the Committee and the Board. No oral argument was permitted before the Court of Appeals. See RCA 3.440.

On May 9, 1975, the Court of Appeals issued a per curiam opinion, finding the petitioner guilty of unethical conduct on all six charges and ordering his permanent disbarment from the practice of law. See p. 1a, *infra*. The opinion reiterated once again what the Court had previously said in *Kentucky Bar Association* v. *Stivers,* 475 S.W.2d 900, 903 (Ky. 1971), to the effect that the report and recommendations of the Trial Committee, and the recommendations of the Board of Governors, are advisory only. The Court proclaimed itself to be the sole judge of the factual issues, the legal issues and the final disciplinary action.

In its capacity as a *de novo* fact finder, the Court of Appeals castigated the petitioner's conduct as being "so bizarre that we cannot imagine any reasonable explanation, and the attempted explanation for the conduct strains the bounds of credulity." And it inferred from the record a critical fact that the Trial Committee was unable to find—i.e., that the petitioner must have "converted his clients' funds to his own use." No such evidence is in the record and no such inference is permissible from any fair reading of the record.

It was that inferred fact, said the Court of Appeals, that warranted the public branding of the petitioner as "no longer fit to be a member of the bar," and further warranted his permanent disbarment.

The per curiam opinion of the Court of Appeals contains no mention of any federal constitutional claims being before it or being rejected by it. Nevertheless, the petitioner in both his original brief (pp. 11-12) and his petition for rehearing (pp. 1-2) before the Court of Appeals asserted that the procedures before the Board of Governors and the Court of Appeals that led to his disbarment violated the due process and equal protection provisions of the "Fourteenth Amendment to the Constitution of the United States." Particular reference was made to the federal constitutional doctrines enunciated in *Selling* v. *Radford,* 243 U.S. 46 (1917), and in *In re Ruffalo,* 390 U.S. 544 (1968), with respect to state disbarment procedures.[3]

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[3] In response to these federal constitutional claims, the Kentucky Bar Association argued in its response to the petition for rehearing (pp. 3-4) as follows:

> "The provisions of Rule 3 of the Court of Appeals relating to disciplinary proceedings afford full and complete due process protections outlined in the Justice Tom C. Clark Report, American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, 'Problems and Recommendations in Disciplinary Enforcement' (June, 1970). The federal due process requirements cited in *In Re Ruffalo,* 390 U.S. 544 (198), while not binding on the states, are a reality in Kentucky disciplinary proceedings."

The opinion below must be construed as having considered and rejected these claims. *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 67 (1928).

REASONS FOR GRANTING THE WRIT

This is a state disbarment proceeding, described by this Court as being "of a quasi-criminal nature." *In re Ruffalo,* 390 U.S. 544, 551 (1968). And long ago this Court recognized the Fourteenth Amendment principle that a disbarment order arising from such a quasi-criminal proceeding cannot stand if "the state procedure, from want of notice or opportunity to be heard, was wanting in due process." *Selling* v. *Radford,* 243 U.S. 46, 51 (1917). See also *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 238-239 (1957), as to the applicability of constitutional due process requirements to bar admission procedures.

The petitioner is thus justified in invoking the certiorari powers of this Court to review a state disbarment order that brings into issue important, novel and difficult procedural problems under the Fourteenth Amendment. No prior decision of this Court has precisely addressed itself to the elementary but critical due process questions created by the disbarment procedures employed by the Court of Appeals of Kentucky. Those procedures are widely utilized by states other than Kentucky, thus making the constitutional questions here raised of nationwide proportions.[4] This

[4] See the statement of the Kentucky Bar Association quoted in footnote 3 above. While the listing is not exhaustive, among the many states that employ procedures substantially similar to those used in Kentucky are New Jersey (Sup.Ct.Rule 1:20); Maryland (Ann.Code, Art. 10, §§ 11-23); Illinois (Rev.Stat. § 110A); Oregon (Rev.Stat. § 9.540); North Carolina (Gen.Stat. § 84-15 et seq.); New York (J.L. § 90[2]; Iowa (Sup.Ct. Rule 118).

case, in short, calls for the exercise of this Court's unique power to insure the proper and uniform application of the great principles of the Fourteenth Amendment.

The reasons why certiorari should thus be granted can most appropriately be stated in the form of two questions stemming from the procedures used by the Kentucky court in ordering petitioner's permanent disbarment:

1. If an advisory body has the power to render a final and unreviewable favorable determination, must it provide some form of a due process hearing to allow the accused attorney to urge upon it that determination?

That question is activated by the rule of the Court of Appeals of Kentucky, RCA 3.370, that empowers the Board of Governors—the intermediate advisory body—to render a "not guilty" verdict on the charges brought against the attorney. In the event the Board so finds, RCA 3.370 provides that "the Board's action is final."[5]

The difficulty arises from the fact that RCA 3.370 also operates to deny an accused attorney, like the petitioner, all opportunity to appear before the Board or to submit any brief or argument urging that such a final acquittal determination be made. The rule likewise operates to deny the attorney all opportunity to make the correlative argument to the Board that it should not find him guilty and should not recommend

[5] In *Kentucky State Bar Association* v. *Stivers,* 475 S.W.2d 900, 904 (Ky. 1971), the Court of Appeals observed: "So far as we are concerned the Board proceeding is mainly a screening device by which the respondent may be finally acquitted but cannot be convicted."

the imposition of the more severe sanctions, such as permanent disbarment. Indeed, since the Court of Appeals can act in a disciplinary case only upon a finding of guilt by the Board (RCA 3.380), the denial of all right to argue the question of guilt before the Board becomes vitally prejudical.

This Court has never considered the precise extent to which the Fourteenth Amendment requires a due process hearing before an intermediate agency empowered to render a final favorable determination. In *Southern Railway Co.* v. *Virginia,* 290 U.S. 190, 197-199 (1933), it was held that where a state highway commissioner was statutorily "empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property," the "inhibitions" of the Fourteenth Amendment outlawed such a final unfavorable decision; the affected party was held "entitled to a fair hearing upon the fundamental facts." It would be a short but important step for this Court now to hold that a "fair hearing" must also be had before an intermediate state agency empowered by court rule to render a final determination favorable to the accused individual.

It may well be that the members of the Board of Governors, who sit in review of the evidentiary hearing afforded by the subordinate Trial Committee, need not provide another complete evidentiary hearing. But if part of the Board's duties is to determine if the accused attorney is not guilty, "that duty cannot be performed by one who has not considered evidence *or argument,*" for "the one who decides must hear." *Morgan* v. *United States,* 298 U.S. 468, 481 (1936); emphasis added. Due process may thus require that

an affected party be given the opportunity at least to present written or oral argument before an intermediate reviewing body possessing powers of final adjudication in certain areas. What this Court said in *Londoner* v. *Denver,* 210 U.S. 373, 386 (1908), would appear pertinent to the process before the Board of Governors:

> "But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal."

This Court has indicated that "the right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances." *F.C.C.* v. *WJR,* 337 U.S. 265, 276 (1949). The same might be said of the right to file written arguments. In the circumstances of a quasi-criminal disciplinary proceeding, where the accused attorney can be "condemned to suffer grievous loss" (*Joint Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123, 168 (1951)), it becomes appropriate for this Court to delineate the necessity and scope of the argument-type hearing that might be appropriate before the Board of Governors. As the Kentucky procedures now stand, the Board acts *in camera* without giving the attorney even the semblance of procedural due process.

This problem is compounded by the fact that at the time of the Board's deliberations, the petitioner had not been advised of the Trial Committee's findings and report. If there be a constitutional right to present some form of argument before the Board, that right

would clearly imply "a reasonable opportunity to know the claims of the opposing party and to meet them" and "to be heard upon" the recommendations of the Trial Committee and the Bar Association, at some point before a determination is made by the Board. *Morgan* v. *United States,* 304 U.S. 1, 18-19 (1938). Otherwise the right to submit argument "may be but a barren one." *Ibid.,* 18. Indeed, this Court has expressly recognized that an applicant for admission to the bar has the constitutional right "to ascertain and contest the bases" of a hearing committee's reports to a judicial tribunal charged with determining the applicant's fitness for admission. *Willner* v. *Committee on Character,* 373 U.S. 96, 105 (1963). A practicing attorney charged with misconduct should have no less of a right.[6]

In the context of a disciplinary proceeding, the various facets of this elemental and far-reaching problem in procedural due process need exploration by this Court.

2. Since the Court of Appeals has proclaimed itself to be the sole judge of all factual issues, must it provide a due process evidentiary hearing?

The opinion below (see p. 2a, *infra*) poses still another new and significant Fourteenth Amendment problem. That problem stems from the citation and application of the principles previously announced by

[6] As was said in *Gonzales* v. *United States,* 348 U.S. 407, 414 (1955), "The petitioner was entitled to know the thrust of the Department's [Trial Committee's] recommendation so he could muster his facts and arguments to meet its contentions."

the Court of Appeals in *Kentucky State Bar Association* v. *Stivers,* 475 S.W.2d 900, 903-904 (Ky. 1971):[7]

> "In any event, the report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. (RCA 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual as well as the legal issues and of the final action to be taken. The role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding."
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> * * *
>
> "In a matter as serious as this the advisory weight of the Board's action can be little more than hortatory, which means in simple English that the members of this court are going to exercise their own judgment anyway."

The Court of Appeals has thus abjured any role as an appellate or reviewing court in disciplinary cases; it has declined to give any weight to the findings of the Trial Committee or to determine if those findings are supported by substantial evidence. Instead, the Court of Appeals has openly adopted "the role of fact-finder." And the fact finding functions of the Trial Committee have been relegated to the status of "hortatory" acts. The members of the Court of Appeals can thus make their own findings of fact, as they did in

[7] This Court denied certiorari in the *Stivers* case. 406 U.S. 968 (1972). But the petition in that case did not present the constitutional question raised by the self-proclaimed status of the Court of Appeals as a fact finder. The petition raised three unrelated questions concerning the basis of the charge, the injection of additional charges, and the failure to accord significance to the evidence introduced by the accused attorney.

this case by inferring the fact that the petitioner "converted his clients' funds to his own use"—a finding not made by the Trial Committee. It was that critical fact, so found by the Court of Appeals, that was said by the court to "warrant" the permanent disbarment of petitioner from the practice of law. See pp. 2a-3a, *infra*.

The due process evidentiary hearing before the Trial Committee, and the Committee's findings that sprang therefrom, have thereby been reduced to insignificance. No evidentiary hearing before the Court of Appeals has has been substituted for that before the Trial Committee. And thereby hangs a constitutional enigma.

True, the demands of due process do not require an evidentiary hearing "at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126, 152-153 (1941). But that assumes that the one evidentiary hearing that is had, at whatever point, is not rendered impotent before the final order becomes effective. As this Court has said, "the requirements of fairness are not exhausted in the taking or consideration of evidence [such as before the Trial Committee in this case] but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." *Morgan* v. *United States,* 304 U.S. 1, 20 (1938). That *Morgan* principle would appear particularly apt where, as here, "the concluding parts of the procedure" have been marked by *de novo* fact findings completely divorced from the evidentiary hearing held before the Trial Committee.

Thus the critical question is whether the Court of Appeals, without according the petitioner some constitutional semblance of an evidentiary hearing, can ignore the Trial Committee's findings and act as a *de novo* fact finder. Can it do so by denominating as "advisory" the Committee's findings and recommendations? Can it thereby deprive the petitioner of the benefits that ensue from a full due process evidentiary hearing conducted by the Trial Committee? Is not petitioner constitutionally entitled to have fact findings drawn from a due process hearing, subject only to the normal evaluations and revisions by a reviewing body?

This Court's decision in *Willner* v. *Committee on Character,* 373 U.S. 96 (1963), may be the clue to this due process problem. In that case, the Appellate Division of the New York Supreme Court, without holding any hearings of its own, had determined that the petitioner's character rendered him unfit for admission to the New York bar. In so doing, the Appellate Division relied entirely upon an inadequate report of a Committee on Character and Fitness, which had also failed to hold a due process hearing. This Court held that the Appellate Division could not escape its constitutional duty to provide procedural due process by claiming that the Committee was a "mere investigator" and that the Committee's action was "merely advisory" to the subjective determinations of the Appellate Division. 373 U.S. at 104.

By the same token, how can the Court of Appeals of Kentucky escape the requirements of procedural due process by treating the fact findings of the Trial

Committee as "advisory"? How can that court establish itself as the sole or *de novo* fact finder where it holds no evidentiary hearing of its own? Is it consistent with due process to limit the petitioner to one brief in the Court of Appeals, a brief that can only be addressed to the "advisory" findings of the Trial Committee? Where and when was the petitioner allowed to protest, much less controvert by evidence, the critical finding by the Court of Appeals that the petitioner had "converted his clients' funds to his own use"? Should not that court have allowed petitioner some meaningful opportunity to protest "by argument, however brief; and, if need be, by proof, however informal"? *Londoner* v. *Denver,* 210 U.S. 373, 386 (1908). See *In re Noell,* 93 F.2d 5 (8th Cir. 1937), holding that an attorney was denied due process where a commissioner reported his findings and recommendations to a state court, which overruled the attorney's exceptions without a hearing.

It may be true, as the Court of Appeals said about its role as a fact finder, that the providing of some sort of an evidentiary hearing "is neither welcome nor comfortable to an appellate court." But if that court wishes to "saddle itself" with the fact finder role, it must also "saddle itself" with the role of procedural due process provider. The logic of the *Willner* decision permits no other answer to this problem.

Only by the grant of certiorari can there be any assurance that, in this era of mounting disciplinary proceedings, the promises of the Fourteenth Amendment's Due Process Clause will be extended to those attorneys accused of being faithless to their professional obligations. It would be folly to condemn such lawyers "to suffer grievous loss" in disregard of the basic requirements of due process of law.

Finally, serious equal protection problems under the Fourteenth Amendment are reached if lawyers involved in disciplinary proceedings are to be denied the benefits of the general law of Kentucky that makes conclusive the findings of the primary fact finder, if supported by substantial evidence. *Kentucky State Racing Commission* v. *Fuller,* 481 S.W.2d 298, 307 (Ky. 1972). To single out such lawyers as immune from that general administrative law principle, and to subject them instead to the *de novo* fact finding process of the Court of Appeals, may well create an impermissible classification under the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted

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APPENDIX

APPENDIX

IN COURT OF APPEALS OF KENTUCKY

KENTUCKY BAR ASSOCIATION, *Complainant,*

v.

JOHN W. COLLIS, *Respondent.*

Rendered: May 9, 1975

Per Curiam

This is a disciplinary proceeding in which the Board of Governors of the Kentucky Bar Association found respondent guilty of unprofessional conduct and recommended that he be permanently disbarred from the practice of law.

A six-count charge was filed against respondent by the Kentucky Bar Association. A trial committee appointed in accordance with the rules heard the testimony of witnesses and after finding the respondent guilty on all counts recommended a reprimand. The Board of Governors at a subsequent meeting considered the record, found the respondent guilty on all counts, and recommended that the respondent be permanently disbarred from the practice of law. In response to the rule issued in accordance with the recommendation of the Board of Governors, respondent moved for an extension of time to file a supplemental brief after taking of additional evidence and issued a *subpoena duces tecum* served on the secretary of the Kentucky Bar Association to produce all records relating to the disciplinary proceeding against the respondent, including the minutes of the meeting of the Board of Governors together with a notice to the secretary of the Kentucky Bar Association to take his deposition. A motion to quash the subpoena and notice was granted by this court.

Respondent alleges that some sinister influence was at work because of the wide disparity between the recommendation of the trial committee and that of the Board of Governors. We consider the taking of further evidence and examination of the records of the meeting of the Board of Governors as to the reasons, if any, for the disparity between the recommendation to be irrelevant. We again point out that "the report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. * * * This means, of course, that in the end this court must be judge of the factual as well as the legal issues and of the final action to be taken." *Kentucky State Bar Association* v. *Stivers, Ky.*, 475 S.W.2d 900, 903 (1972).

We review the record and arrive at our own conclusion as to the proper disposition of the case. The record here is voluminous and covers in minute detail every aspect of the counts contained in the charge. Without a tedious detailing of the facts, the record clearly discloses that in three cases the respondent wrongfully withheld his clients' funds for varying periods of time, and in each case one or more times issued checks which were returned for "insufficient funds." The respondent's conduct as revealed in this record is so bizarre that we cannot imagine any reasonable explanation, and the attempted explanation for the conduct strains the bounds of credulity. In short, we find no satisfactory explanation which could mitigate the seriousness of respondent's conduct. We are of the opinion that the conduct of respondent portrays such a pattern of dishonesty and lack of ethical standards in dealing with his clients, that he is no longer fit to be a member of the bar. See *Kentucky Bar Association* v. *Tucker,* Ky., —— S.W.2d —— (rendered May 9, 1975).

The only inference which can be drawn from the testimony in this record is that the respondent converted his clients' funds to his own use. The checks returned for

"insufficient funds" from different bank accounts in the circumstances presented here, without any credible explanation, can only mean that the clients' funds were no longer intact and were converted by the respondent to his own use. This conduct warrants the permanent disbarment of an attorney from the practice of law. *In re Waxman,* 290 Ky. 277, 160 S.W.2d 587 (1942).

When an attorney converts his client's funds to his own use, he commits an offense greater and broader than a mere injury to his client, he brings the entire bar into disrepute in the eyes of the public. Such conduct evinces the unfitness of the attorney to be a member of the legal profession and an officer of the court.

Respondent's argument that his clients did not suffer a loss and that all funds were finally paid cannot be considered mitigating in the circumstances presented here.

The public is entitled to rely on an attorney's admission to the practice of law as a certification of the attorney's honesty, high ethical standards and good moral character. If the public's confidence in the legal profession is to be maintained, it is the duty of the Kentucky Bar Association and this court to remove those attorneys why by their dishonest actions in dealing with clients' funds and otherwise demonstrate a lack of these qualities. Respondent's conduct in our opinion is so reprehensible as to make him unworthy of public confidence and unfit to be an officer of the court.

Accordingly, it is ordered that respondent be and he is hereby permanently disbarred from the practice of law in

this Commonwealth, and he is required to pay the costs of proceeding.

All concur.

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Mandate

THE COMMONWEALTH OF KENTUCKY, THE COURT OF APPEALS

75 Term—May 9, 1975

KY. BAR ASSOCIATION

v.

JOHN W. COLLIS

Appeal from a Judgment of the

In C. of A. ..... Circuit Court

It is therefore ordered that the respondent, John W. Collis, is hereby permanently disbarred from the practice of law in the commonwealth of Kentucky, that he fully comply with the provision of RCA 3.390 and that the respondent is ordered to pay the costs of this action including the cost certified by the Kentucky Bar Association.

/s/ FRANCES JONES MILLS

Frances Jones Mills, C. C. A.

By ....., D. C.

Issued June 27, 1975
Respondent's Petition for Rehearing Denied.
6-27-75

Meeting
Board of Governors
Hilton Inn
Lexington, Kentucky
January 18, 1975

(Filed January 23, 1975)

The next order of business concerned the charge against John W. Collis. The Trial Committee composed of William E. Johnson, Chairman; Ephriam K. Lawrence, Jr., and John L. Arnett having tendered a written Report recommending that the Respondent be adjudged guilty of unprofessional conduct and reprimanded by the Court of Appeals of Kentucky. On motion duly made and seconded, the Report was ordered filed.

On call of the roll, the Respondent was adjudged guilty as charged by a vote of 15-0. Upon a second roll call, by a vote of 15-0, it was recommended that the Respondent be permanently disbarred from the practice of law in Kentucky.

IN RE: JOHN W. COLLIS

FINDINGS AND RECOMMENDATIONS OF THE BOARD OF GOVERNORS

The above case having been called and a report having been submitted and approved and the matter having been fully considered, the following finding and recommendation is made:

FINDING

That the Respondent, John W. Collis, be adjudged guilty.

RECOMMENDATION

It is respectfully recommended to the Kentucky Court of Appeals that John W. Collis be permanently disbarred

from the practice of Law in Kentucky and required to pay the costs in this action.

This January 18, 1975.

/s/ HENRY D. STRATTON
Henry D. Stratton, *President*

ATTEST:

/s/ LESLIE G. WHITMER
Leslie G. Whitmer, *Director*

RULE

on
Finding and Recommendation
of the
Board of Governors
of the
Kentucky Bar Association

THE COMMONWEALTH OF KENTUCKY,

To the Sheriff of Fayette County, GREETINGS:

The President of the Kentucky Bar Association having filed an order pursuant to RCA 3.370 recommending disciplinary action in the matter of

KENTUCKY BAR ASSOCIATION, *Complainant*

versus

JOHN W. COLLIS, *Respondent*

you are hereby commanded to summons Respondent to appear before the Court of Appeals, Frankfort, Kentucky, or file due response within 20 days after the service of this summons, and show cause, if any he has or can, why he should not be adjudged guilty of unprofessional conduct and disciplined therefore, and warn him that upon his failure to answer, the Rule herein shall be made absolute and you will make due return of this summons immediately upon the execution thereof.

Issued at Frankfort, Kentucky, this the 23rd day of January, 1975.

/s/ FRANCES JONES MILLS
Clerk, COURT OF APPEALS

COURT OF APPEALS OF KENTUCKY

KENTUCKY BAR ASSOCIATION, *Complainant*,

vs.

JOHN W. COLLIS, *Respondent*.

Report, Findings of Fact
Conclusions of Law,
Recommendation

This matter came on for hearing before the Trial Committee, pursuant to notice, on November 6, 1974, at 10:00 a.m. The Trial Committee after hearing testimony of witnesses, argument of counsel and having considered the exhibits introduced at the hearing and being fully advised, makes this Report, Findings of Fact, Conclusions of Law and Recommendation.

FINDINGS OF FACT

1. *Complaint concerning James Hollie Taylor.* The Respondent collected the proceeds payable to James Hollie Taylor under a policy of insurance with the Independence Life and Accident Insurance Company. These proceeds were paid to the Respondent on March 13, 1973. The Respondent placed such funds in his personal bank account. It was not until May 31, 1973, that the Respondent delivered a portion of the proceeds (after deducting a sum as a fee for services) to Mr. Taylor. The check from the Respondent to Mr. Taylor was dishonored when first presented for payment, but later honored.

2. *Complaint concerning Mike H. Pappas.* That the Respondent, without his client's knowledge and consent, failed to satisfy the outstanding mortgages which encumbered the property being purchased by Mike H. Pappas, prior to the closing of the transaction. While the evidence is conflicting as to whether Mr. Pappas was made aware of the existence of the Kissel Company mortgage prior to

December, 1972, this is not a fact of great importance since the Respondent knew of the mortgage and took no steps to promptly satisfy the mortgage indebtedness. Payments due on the mortgage were permitted by the Respondent to become delinquent and this caused harassment and worry to his client, Mr. Pappas. Many of the checks given by the Respondent to the Kissel Company for mortgage payments were returned by the bank because of insufficient funds being in the Respondent's bank account to satisfy the checks. The mortgage was paid by Respondent and Mr. Pappas lost no money thereby.

3. *Complaint concerning James E. Lewis.* The Respondent, as attorney for Mr. James E. Lewis, made an agreement with C.N.A. Insurance Company and Mr. Lewis whereby it was agreed that he (the Respondent) would deposit the agreed settlement amount in the sum of $7,090.63 in his escrow account until the Kentucky Workmen's Compensation Board approved the settlement. The settlement check was dated June 29, 1973, and was delivered to the Respondent on or about that date. Mr. Lewis endorsed the check, and left it with the Respondent on or about that same date. The Respondent did not file the necessary documents for approval of the settlement with the Workmen's Compensation Board until June 19, 1974. In the period of time from June 29, 1973, to November of 1973, the Respondent made random payments to Mr. Lewis. One of the payments was by a post dated check in the sum of $5,500.00 which check was deposited on September 19, 1973, and this check was returned to Mr. Lewis because of insufficient funds being in the account of the Respondent, but later the check was honored.

4. *Complaint concerning Mr. and Mrs. Bobby Shelton.* Mr. and Mrs. Bobby Shelton employed the Respondent on January 22, 1974, to file voluntary bankruptcy petitions on their behalf. Several months expired without the petitions being filed by the Respondent. During this

period, a suit was filed against Mr. and Mrs. Shelton on a claim which should have been listed on their bankruptcy petitions. Further, they were subject to harassing calls from their creditors during this period of time. The Respondent did not file the bankruptcy petition until after May 24, 1974.

Conclusions of Law

The Trial Committee concludes that the Respondent is guilty of unprofessional and unethical conduct in:

(1) *Complaint concerning James Hollie Taylor.* Failing to place funds paid to him by Independence Life and Accident Insurance Company for his client, James Hollie Taylor, in an identifiable escrow bank accout;

(2) Paying his client, James Hollie Taylor, more than two months after the insurance proceeds check was received, by a check on an account having insufficient funds therein;

(3) *Complaint concerning Mike H. Pappas.* Failing to promptly satisfy the mortgages after the closing of the purchase of the property so that Mr. Pappas would not be harassed or bothered by the mortgagees;

(4) Making payments on the mortgage to the Kissel Mortgage Company by checks which were returned to the Kissel Mortgage Company for insufficient funds;

(5) *Complaint concerning Mr. and Mrs. Bobby Shelton.* Failing to promptly file voluntary petitions in bankruptcy for his clients, Mr. and Mrs. Bobby Shelton;

(6) *Complaint concerning James E. Lewis.* Failing to promptly seek the approval of the Workmen's Compensation Board of the settlement between James E. Lewis and C.N.A. Insuranc Company, resulting in the client, Lewis, being inconvenienced and delayed in receiving settlement funds due him;

(7) Paying his client, James E. Lewis a portion of the funds due him, by a check which was returned because of insufficient funds.

RECOMMENDATION

That the Respondent be given a reprimand deemed proper by the Court of Appeals of Kentucky.

Respectfully submitted,

See separate attached statment

WILLIAM E. JOHNSON

/s/ JOHN L. ARNETT

/s/ EPHRIAM K. LAWRENCE, JR.

The undersigned agrees with the Report in so far as the Findings of Fact and Conclusions of Law. However, it is my opinion that the recommendation should be that the respondent be given a public reprimand and censure by the Court of Appeals of Kentucky.

/s/ WILLIAM E. JOHNSON

Supreme Court, U. S.
D
OCT 14 1975

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-471

JOHN W. COLLIS, *Petitioner*
Vs.
KENTUCKY BAR ASSOCIATION, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

LESLIE G. WHITMER
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October 13, 1975

PRESS OF KENTUCKY INVESTORS, INC., FRANKFORT, KENTUCKY

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Kentucky Court of Appeals (Petition, Appendix, pp. 1a - 4a) is unreported at this time.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the disciplinary proceedings of the Kentucky Bar Association and the Court of Appeals of Kentucky were conducted in such a way as to deny the petitioner procedural due process of law under the Fourteenth Amendment of the Constitution of the United States.

2. Whether the evidence supports the findings and judgment of the Kentucky Court of Appeals.

RULES INVOLVED

Kentucky Court of Appeals Rules Concerning Procedures in Disciplinary Cases

3.380 Degrees of Discipline

Upon finding by the Board of guilt or unprofessional conduct, discipline may be administered by way of private reprimand issued by the Board without further proceedings or right of appeal to the Court; or by the Court, under RCA 3.320, or upon recommendation by the Board, by way of public reprimand, censure, suspension from practice or disbarment. If a private reprimand is issued, it shall not be made public and shall be transmitted only to the respondent, or to his attorney, and to the attorney for the complainant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Sec. 1:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Revised Statute 30.170:

30.170 Court rules governing practice of law and state Bar

(1) The Court of Appeals shall adopt and promulgate rules:

(a) Defining the practice of law;

(b) Prescribing a code of ethics governing the professional conduct of attorneys and the practice of law;

(c) Establishing practice and procedure for disciplining, suspending and disbarring attorneys;

(d) Organizing and governing a bar association of the attorneys of the state to act as an administrative agency of the Court of Appeals for the purpose of enforcing such rules as are adopted and promulgated by the court under this section; providing for the government of the state bar as a part of the judicial department of state government, and for such divisions thereof as the Court of Appeals determines; requiring all persons practicing law in this state to be members in good standing of the state bar; and fixing the form of its organization and operation;

(e) Fixing fees upon recommendation of the board of bar commissioners to be paid for the purpose of administering this section and the rules adopted and promulgated under it, and for the collection and disbursement of such fees.

(2) The rules of court adopted and promulgated under this section shall supersede all laws or parts of law in conflict therewith, to the extent of the conflict.

(3) No rule adopted and promulgated under this section shall prevent a person not holding himself out as a practicing attorney from writing a deed, mortgage or will, or prevent a person from drawing any instrument to which he is a party.

STATEMENT OF THE CASE

Petitioner seeks to argue limited facts in this case out of context, therefore, a detailed statement of facts will assist the Court in its determination of this matter.

A six-count charge was filed against petitioner by respondent on September 4, 1974. The first count relates to petitioner's failure to segregate monies in the sum of $2,289.26 entrusted to him by his client, James Hollie Taylor, in an identifiable escrow bank account. (Transcript of Proceeding Before Trial Committee, Vol. II, 57; III, 26-27). When Mr. Taylor requested payment of the escrow funds, petitioner issued a check for $2,095.28 which was subsequently dishonored for insufficient funds. (Vol. II, 66).

Count II of the charge relates to petitioner's failure to satisfy an outstanding mortgage on realty in a land closing transaction when his client, Mike H. Pappas, had paid the full purchase price of $19,000.00 to petitioner with the intention and understanding that all debts of the transaction would be paid. (Vol. I, 46). Mr. Pappas did not become fully aware of the continuing existence of the said mortgage until some seventeen months later. (Vol. I, 27).

The third count stems from the same transaction as in Count II above, wherein petitioner, during the period between July, 1972, and January, 1974, issued to the Kissell Mortgage Company four different checks which were dishonored and returned for insufficient funds (Vol. I, 94-96), one of them twice dishonored. (Vol. I, 99). Some of Petitioner's checks were issued on his escrow account and others were from his own personal bank accounts. (Vol. I, 95). The checks were issued in petitioner's attempt to make monthly payments on the existing note and mortgage for the realty of Mike H. Pappas.

Count IV relates to petitioner's failure to promptly file a workman's compensation settlement after insurance proceeds were endorsed by his client, James E. Lewis, to petitioner in the sum of $7,090.63. (Vol. II, 49). Petitioner was to place said proceeds into an escrow account and pay to Mr. Lewis the said proceeds upon approval of the settlement by the Workman's Compensation Board. (Vol. II, 5). Petitioner gave Mr. Lewis random payments until September, 1973, when he tendered a check to Mr. Lewis for $5,500 which was returned for insufficient funds. (Vol. II, 13).

Count V relates to petitioner's failure to promptly file a petition for bankruptcy to Bobby G. and Linda K. Shelton, when in fact the Sheltons had paid petitioner's fees in full. (Vol. II, 103). Petitioner had falsely told the Sheltons he had filed suit when in fact he had not. (Vol. II, 107). This count was not considered in the opinion of the Kentucky Court of Appeals.

An answer to this charge was duly filed by petitioner,

and the Inquiry Tribunal ordered that a trial hearing be held. Thereafter, a trial committee consisting of William E. Johnson, Chairman (commissioned by the Chief Justice of the Kentucky Court of Appeals to try the issues of the case); Ephraim K. Lawrence, Jr., and John L. Arnett, conducted the hearing held on November 6, 1974, into the early morning of November 7, 1974. This trial committee recommended in its report to the Board of Governors, filed January 7, 1974, that petitioner be given a reprimand deemed proper by the Court of Appeals. Chairman Johnson made a separate recommendation that petitioner be given a public reprimand and censure by the court. (See RCA 3.380). The trial committee's conclusion of law was that petitioner was guilty of unprofessional and unethical conduct by failing to place funds paid to him in an identifiable escrow bank account in the James Hollie Taylor matter; by paying to Mr. Taylor the proceeds two months after they were received by his check on an account having insufficient funds; by failing to promptly satisfy the mortgage in the Mike H. Pappas matter so that Mr. Pappas would not be harrassed by the mortgagee; by making payments to the said mortgagee which were returned for insufficient funds; by failing to promptly file voluntary petitions in bankruptcy for his clients, Mr. and Mrs. Shelton; by failing to promptly seek approval by the Workman's Compensation Board in the James E. Lewis matter, resulting in inconvenience and delay to Mr. Lewis in receiving the settlement funds; and by paying Mr. Lewis part of the settlement by a check which was returned for insufficient funds.

Thereafter, the Board of Governors on January 18, 1975, considered the trial committee's report, reviewed the entire record, and unanimously recommended to the Kentucky Court of Appeals a finding of guilty, and that petitioner be permanently disbarred from the practice of law in the Commonwealth and be required to pay the costs in this action. Pursuant to these recommendations, the court issued a rule to show cause why the Board of Governors recommendation should not be made final. The petitioner duly filed a response on May 4, 1975. On May 9, 1975, the Kentucky Court of Appeals rendered a Per Curiam Opinion, all Justices sitting, disbarring petitioner from the practice of law. Petitioner filed a Petition for Rehearing on June 9, 1975, respondent answered and the petition was denied on June 27, 1975.

ARGUMENT

The issues raised by the petitioner in his Petition for Writ of Certiorari concern the constitutionality of the procedures utilized by the Kentucky Court of Appeals in disciplining an officer of the court.

Each issue raised by petitioner will be answered briefly after a short consideration of the general issues in the case.

I

THE DECISION BELOW WAS BASED ON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND

The constitutional issues raised by petitioner in his

Petition for Rehearing before the Kentucky Court of Appeals were whether or not the disciplinary proceedings by the Kentucky Bar Association and the court were conducted in such a way as to deny him rights of procedural due process under the Fourteenth Amendment of the United States Constitution. The court in its Per Curiam Opinion clearly based its decision on independent and substantial non-federal grounds..

Under the Rules of the Court of Appeals and Kentucky case law, the findings of the trial committee and the Board of Governors were only advisory; and the court itself made an independent examination of the factual and legal issues involved. The court itself was the only body which could impose any disciplinary action and there was no denial of procedural due process. All rules of the court were strictly followed at all stages of the proceeding.

The court has clearly stated this position in its Opinion below citing ***Kentucky State Bar Association v. Stivers***, Ky., 475 SW2d 900 (1972), stating, in part:

> "The report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. RCA 3.400, 3.420 (now RCA 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual issues and of the final action to be taken; The role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding." (p. 904.)

* * *

> "But it must be recognized that its action is nothing more than advisory to this Court. So far as we are concerned, the Board proceeding is mainly a screening device by which the respondent may be finally acquitted but cannot be convicted." (p. 904.)

* * *

> "In a matter as serious as this, the advisory weight of the Board's action can be little more than hortatory, which means in simple English, that the members of this Court are going to exercise their own judgment anyway." (p. 904.)

It is equally clear that the court did exercise its own judgment by the fact that it refused to follow the recommendations of the trial committee concerning recommended discipline. Its judgment concerning factual issues agreed with the recommendations of the trial committee and the Board.

The constitutional issues raised by petitioner were answered by the court through the interpretation of Kentucky law and the Rules of the Court of Appeals of Kentucky. There were no federal issues to be decided since the sole basis on which to determine the validity of the petitioner's constitutional arguments rested on the proper interpretation of Kentucky law and standards of conduct set by the Kentucky court.

Another issue raised by the petitioner in his brief before the Court of Appeals concerned the evidentiary findings and recommendations made by the trial com-

mittee. This issue was clearly defined by the court upon independent non-federal grounds. The court held that the report and recommendations of the trial committee and Board were only advisory.

The court in its role as fact finder specifically and unequivocally held:

> "We review the record and arrive at our own conclusion as to the proper disposition of the case. The record here is voluminous and covers in minute detail every aspect of the counts contained in the charge. Without a tedious detailing of the facts, the record clearly discloses that in three cases the respondent wrongfully withheld his clients' funds for varying periods of time, and in each case one or more times issued checks which were returned for 'insufficient' funds. The respondent's conduct as revealed in this record is so bizarre that we cannot imagine any reasonable explanation, and the attempted explanation for the conduct strains the bounds of credulity. In short, we find no satisfactory explanation which could mitigate the seriousness of respondent's conduct. We are of the opinion that the conduct of respondent portrays such a pattern of dishonesty and lack of ethical standards in dealing with his clients, that he is no longer fit to be a member of the bar." (Petition, Appendix, page 2a.)

After firmly placing its opinion on uncontroverted facts found in the record formed by the trial committee at a

due process hearing and so admitted by petitioner, the court then drew an inference, the *only* inference that can be drawn from a record devoid of factual defenses to the facts found by the court:

> "The only inference which can be drawn from the testimony in this record is that the respondent converted his clients' funds to his own use. The checks returned for 'insufficient funds' from different bank accounts in the circumstances presented here, without any credible explanation, can only mean that the clients' funds were no longer intact and were converted by the respondent to his own use. This conduct warrants the permanent disbarment of an attorney from the practice of law. In re Waxman, 290 Ky. 277, 160 SW2d 587 (1942)."
>
> * * *
>
> "Respondent's argument that his clients did not suffer a loss and that all funds were finally paid cannot be considered mitigating in the circumstances presented here." (Petition, Appendix, pp. 2a - 3a.)

It is interesting to note that petitioner produced no bank records whatsoever to support his defense. It is submitted, by inference, that the records would not have supported a defense but would have been damaging to his only defense based on uncorroborated, self-serving statements. The record clearly shows the upset and inconvenience his clients suffered by petitioner's highly

unprofessional and unethical conduct. The facts in this case clearly show petitioner to be dishonest and unfit to practice law. The public must be protected from such a practitioner.

The petitioner has requested this court to grant a Petition for Writ of Certiorari, and yet a close examination of the issues involved and a careful reading of the opinion rendered by the Court of Appeals clearly reveals that the results reached in this case by the Court of Appeals of Kentucky were based upon a clear and careful analysis of Kentucky substantive law, the Rules of the Court of Appeals and the record in the case as a whole. Certiorari certainly should not be granted merely to review the findings of fact made independently by the Court of Appeals of Kentucky and the sound standards of conduct applied to those facts by the court.

II

THE DISCIPLINARY PROCEEDINGS OF THE KENTUCKY BAR ASSOCIATION AND THE KENTUCKY COURT OF APPEALS DID NOT DENY PETITIONER PROCEDURAL DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Petitioner states on page 10 of his Petition that *In re Ruffalo*, 390 U.S. 544, 551 (1968), holds that state disciplinary proceedings are "of a quasi-criminal nature." The *Ruffalo* case dealt with a federal disbarment proceeding. This Court had before it the state proceeding but denied the Petition for Writ of Certiorari.

Ruffalo v. Mahoning County Bar Association, 379 U.S. 931 (1964). While this Court has never, to respondent's knowledge, held that a state disciplinary proceeding lacks due process protections or even granted a Petition for Writ of Certiorari based on a state disciplinary proceeding, it is certainly clear this case raises no important constitutional issue warranting review by this Court in setting a precedent to grant review of unified state bar disciplinary procedures.

In furtherance of respondent's statement before the Kentucky Court of Appeals and set forth in footnote 3 of the Petition, page 9, it is significant to note Chief Justice Warren E. Burger's comments on nationwide disciplinary efforts:

> "It is now five years since a committee of the American Bar Association, chaired by my distinguished colleague, Mr. Justice Clark, reported in essence that although we lawyers profess to regulate and discipline ourselves, by and large discipline of professional misconduct of lawyers is virtually non-existent in most of the fifty States. The American Bar Association is undertaking some steps to implement the Clark report, and in the past year or more there are encouraging signs of more progress than in the previous 25 years. That program demands more impetus and the moral support of the law school community, and of course the support of judges." Remarks of Chief Justice Warren E. Burger, Convocation for the Dedication, J. Reuben Clark, III Law School, Brigham Young

University, Provo, Utah, September 5, 1975.

The constitutional issues raised by petitioner are moot because Rule 3 of the Kentucky Court of Appeals affords a lawyer complete procedural due process of law by any standard. No critical due process question is raised by petitioner. Respondent is aware of no nationwide issue being raised in this case. No evidence is presented of these constitutional issues being raised in any other state proceeding either at the state level or before this Court.

(a) **There is no denial of due process where a lawyer is not given any opportunity for a hearing before the Board of Governors.**

Petitioner states that a 15-man Board of Governors considers disciplinary cases. There are 17 Board members that hear disciplinary cases. Petitioner readily admits he had a full due process hearing before a three-man trial committee, the chairman of which was designed and commissioned by the Chief Justice of the Kentucky Court of Appeals to try the issues in the proceeding. (Petition, page 5.)

In order for the Court to review the excellent due process procedures incorporated into Rule 3 of the Kentucky Court of Appeals, it is necessary to start at the beginning of the disciplinary process. In petitioner's case, complaints were filed and investigated alleging matters of severe unprofessional conduct. Notice was given of the complaints and timely responses were filed. The Inquiry Tribunal appointed by the Chief Justice of

the Kentucky Court of Appeals reviewed the complaints and responses and determined that probable cause existed to conclude that petitioner had been engaged in unprofessional conduct; therefore, a charge was filed. Petitioner received notice of the charges and filed a timely answer thereto. A full due process hearing was held in a "de novo" climate. The advisory trial committee report, the charge and transcript of proceedings before the trial committee were reviewed by the Board of Governors without the presence of counsel on either side. The following order appears in the Board's minutes of January 18, 1975:

> "The President excused from the room all persons whose presence was not authorized pursuant to the Rules as they relate to the consideration of disciplinary cases. In Executive Session, the Board considered the disciplinary case of John W. Collis."

This order answers allegations in the Petition, footnote 2, page 7, concerning compliance with Rule 3 of the Kentucky Court of Appeals. The Board of Governors had three alternatives: dismiss charges, issue a private reprimand or recommend public discipline to the Kentucky Court of Appeals. If the first two alternatives had been exercised, the case would have terminated without any detriment to petitioner and the Board's sole function as a "screening device" would have been utilized. The vital elements of the due process hearing were fresh before the Board of Governors. The Board proceeded to ***recommend*** to the Kentucky Court of

Appeals discipline in the form of disbarment. At that point, a possible point of detriment to petitioner, the court issued a rule to show cause submitting to petitioner the advisory trial committee report and order of the Board. Petitioner at that point, again, had an opportunity to file a response to the rule and brief in support thereof. Petitioner exercised that right. After the adverse opinion of the Kentucky Court of Appeals was rendered, petitioner exercised his rights to file a petition for rehearing wherein new issues were presented to the court. In short, Kentucky's disciplinary proceedings are carefully drafted to assure all possible due process to an attorney under charge. At all crucial points in the proceeding notice and an opportunity to be heard are provided on numerous occasions.

It is respectfully submitted that case law involving administrative proceedings in the executive branch of government with the right of review by the judicial branch are not applicable to original actions in the judicial branch by the court of highest jurisdiction in a state seeking to discipline officers of the court through proceedings instituted by the court through an administrative arm of the court: its unified bar association. Due process of law must be accorded to an attorney. This had been done without any doubt by Rule 3 of the Kentucky Court of Appeals.

The disciplinary proceedings of the Kentucky Court of Appeals are not unlike disciplinary proceedings before the United States Supreme Court as provided in Rule 8. It appears that where factual issues are raised, the Court may appoint a committee to make an inquiry into the

matter and submit a report and recommendation to the Court. Stern and Gressman, *Supreme Court Practice*, 3rd Edition (1962).

Respondent will answer specific matters raised by petitioner regarding proceedings before the Board of Governors. The Board of Governors serves as a "screening device". A charge can be dismissed by the Board, however, *no* public discipline can be ordered so there is *no final* action taken by the Board in that respect. It would serve no useful purpose to permit either respondent or petitioner or both to appear before the Board in any manner other than by the record produced at the due process hearing. The use of this "screening device" is based on state law and raises no federal due process issue. There is no "hearing" before the Board. The proceedings before the Board are a valid exercise of the statutory (KRS 30.170) and inherent power of the Kentucky Court of Appeals (Rule 3).

When the Board recommends public discipline, a lawyer is given access and notice of the entire disciplinary file and has the opportunity to respond to a rule to show cause and file a brief in support thereof before the court decides his case. There is no disparity between the factual findings of the trial committee and the Board or the court in this case. All three members of the trial committee recommend a *public* reprimand by the Court of Appeals. Had the "Board" step of the proceeding been eliminated, the case would have gone to the Kentucky Court of Appeals for determination of factual matters and the degree of discipline to be ordered. Petitioner, at page 6 of his Petition, is in error when he

states the trial committee recommended a private reprimand. There is only an issue raised by the Board's order as to the degree of discipline to be ordered. The Board recommended disbarment. Certainly this Court will not entertain the issue of whether or not the case should have been dismissed or the degree of public discipline to be given by the state court. The test of ***Willner v. Committee on Character***, 373 U.S. 96, 105 (1963) is sustained by Kentucky disciplinary rules. Petitioner had notice and, in fact, answered as fully as he could before the Inquiry Tribunal, the trial committee and the court before final discipline was ordered. He was also heard before the court on a Petition for Rehearing. There is no rule that prohibited petitioner from requesting an oral argument before the court. Petitioner never moved the court for an oral argument.

(b) **The absence of a full factual inquiry before the Justices of the Kentucky Court of Appeals in person where the court judges all factual issues does not deny due process.**

The aforesaid issue was not raised before the Kentucky Court of Appeals and is, therefore, not properly before this Court; however, the issue will be discussed.

The Court of Appeals did give weight to the findings of the trial committee and the Board of Governors. The court made the same finding as the two lower bodies in relation to the numerous checks given clients and returned because of "insufficient funds". The court stated it drew an inference in stating the funds had been converted

to petitioner's own use. The record is void of any evidence whatsoever showing this was not the case. Had the inference been eliminated from the opinion, the result would have been the same. The clients' funds were not intact. Disbarment results under that fact situation. This case is not unlike the case of ***Kentucky Bar Association v. Judy Ward Smith***, Ky., 492 SW2d 880 (1973), certiorari denied, 414 U.S. 859, where the Court of Appeals, exercising its fact finding authority, found from the record that Ms. Smith was guilty of various crimes and perjury at the trial hearing from the transcript formed before the trial committee and disbarred her even though she was given no hearing in these "new findings" before the court. This Court denied her Petition for Writ of Certiorari when the Kentucky court's action was challenged.

Petitioner argues that there is a de novo proceeding before the Kentucky Court of Appeals. This is not an accurate statement. The court must and in this case did make its findings from the record produced at a full due process hearing. In no way was this hearing's product reduced to insignificance before the Kentucky Court of Appeals. Only the degree of discipline imposed was increased from the recommendation of the trial committee. This due process hearing was further reinforced by a rule to show cause before the Kentucky Court of Appeals together with a Petition for Rehearing.

The ***Willner*** case is certainly not the key to this case as contended by petitioner. (Petition, page 17.) As stated by petitioner, the New York Appellate Division relied on an ***inadequate*** report of a committee on character and

fitness in a bar admissions case where the committee held no due process hearing. Petitioner admits a full due process hearing before the trial committee. The product of this hearing formed the record before the Kentucky Court of Appeals: a complete, accurate and fair record. Petitioner at all stages of response answered as fully as he could to all counts of the charge. The Petition for Rehearing permitted the Kentucky Court of Appeals to correct any error it may have made in its opinion. There were no errors. No corrections needed to be made.

Petitioner states that *In re Noell*, 93 F.2d 5 (8th Cir., 1937), holds that an attorney was denied due process where a commissioner reported his findings and recommendations to a state court, which overruled the attorney's exceptions without a hearing. The case does not hold that statement of law. The Circuit Court of Appeals *did not* have the state proceeding before it. The *Noell* case concerned a federal disciplinary case before a federal court.

No Kentucky lawyer is disbarred before the Kentucky Court of Appeals without first having his due process rights fully protected by the rules of that court. Full constitutional safeguards are given a lawyer.

III
THE DECISION BELOW IS CORRECT AND THERE ARE NO JUSTICIABLE REASONS FOR GRANTING THE WRIT

The Per Curiam Opinion of the Kentucky Court of

Appeals is based soundly on facts in the record before it. The court considered all defenses offered by petitioner and clearly stated so. The court found no mitigating circumstances in the record in its sound discretion. A fair reading of the record supports the entire opinion of the court. The opinion clearly states the evidence it found in the record to support its findings. The court applied a clear standard to the facts citing the public peril resulting from petitioner's actions and its grave effect on the image of the bench and bar. Disbarment is the only responsible action the Kentucky Court of Appeals could take to protect the public from the gross, dishonest misconduct of petitioner.

Petitioner has misapplied the case of ***Kentucky State Bar Association v. Jones***, Ky., 372 SW2d 794 (1963), to the facts of this case. Jones received a public reprimand for failure to promptly disburse a client's funds. Petitioner did not have his clients' funds when he sought to distribute them. On November 11, 1969, by RCA 3.130, the Kentucky Court of Appeals adopted the American Bar Association Code of Professional Responsibility as a sound stardard of conduct required of lawyers and that charges can be preferred where those standards are not met. The following provisions of the Code have obviously been breached by petitioner:

DR 1-102 Misconduct

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty. . .

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 9-102 Preserving Identity of Funds and Property of Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank account maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities or other properties in the possession of the lawyer which the client is entitled to receive.

EC 9-5 of the Code States:

> Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

This Court has made clear the strong state interest of state courts in disciplining its members in the recent case of ***Goldfarb v. Virginia State Bar, et al.***, 95 S.Ct. 2004 (1975) at p. 2016, when it stated:

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' United States v. Oregon State Medical Society, 343 U.S. 326, 336, 72 S.Ct. 690, 697, 96 L.Ed. 978 (1952), see also Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 611-613, 55 S.Ct. 570, 571-572, 79 L.Ed. 1086 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of

> administering justice, and have historically been 'officers of the courts'. See Sperry v. Florida, 373 U.S. 379, 383, 83 S.Ct. 1322, 1325, 10 L.Ed. 2d 428 (1963); Cohen v. Hurley, 366 U.S. 117, 123-124, 81 S.Ct. 954, 958, 6 L.Ed. 2d 156 (1962); Law Students Research Council v. Wadmand, 401 U.S. 154, 157, 91 S.Ct. 720, 723, 27 L.Ed.2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act, we intend no diminution of the authority of the State to regulate its professions."

Petitioner seeks to relitigate his case on factual issues before this Court. If the Kentucky Court of Appeals gave little significance to the petitioner's evidence, it was due to the lack of credibility of the evidence and not due to an oversight on the part of the court. Here again, petitioner has urged as a reason for granting certiorari an issue which is not valid. The factual determination by the lower court and the weight and credibility accorded to the evidence are not properly reviewable especially where the court, directly in its opinion, reviewed the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Leslie G. Whitmer, Counsel for Kentucky Bar Association, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of October, 1975, I served on Honorable Eugene Gressman, 1828 L. Street, N.W., Washington, D.C. 20036, and Honorable Robert J. Turley, 207 First Federal Building, Lexington, Kentucky 40507, Attorneys for Petitioner, a copy of this brief by mailing same, postage prepaid.

Leslie G. Whitmer
LESLIE G. WHITMER

Supreme Court, U. S.
FILED
NOV 28 1975
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-471

JOHN W. COLLIS, *Petitioner,*

v.

KENTUCKY BAR ASSOCIATION, *Respondent.*

On Petition for a Writ of Certiorari to the Court of Appeals of Kentucky

PETITIONER'S REPLY BRIEF

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November 28, 1975

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PETITIONER'S REPLY BRIEF

The Respondent's Brief in Opposition needs a short reply.

I

The Respondent concedes (Opp. Br. 7-8) that the Petitioner did raise federal constitutional due process objections to the disbarment procedure before the Court of Appeals of Kentucky. He did so, as the Petition makes clear (p. 9), both in his main brief to that court and in his petition for rehearing. And the Respondent now concedes (Opp. Br. 9) that the "constitutional issues raised by petitioner were an-

swered by the [Kentucky] court through the interpretation of Kentucky law and the Rules of the Court of Appeals of Kentucky."

Such a concession is quite proper, for that interpretation and application are precisely why the judgment below must be construed as involving a denial of these federal constitutional claims, thereby supporting the jurisdiction of this Court to review such a denial. The fact that the denial was not express does not detract from that jurisdictional base. *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 67.

But the Respondent errs in asserting (Opp. Br. 9) that such a response to the federal constitutional claims left "no federal issues to be decided since the sole basis on which to determine the validity of the petitioner's constitutional arguments rested on the proper interpretation of Kentucky law and standards of conduct set by the Kentucky court." Resolution of federal constitutional claims of this nature must always involve and rest upon a proper interpretation of the relevant state law. Obviously, indulging in such interpretation does not destroy the federal claims or arguments. It only serves to emphasize that the denial of the federal claims was a necessary part of the decision below.

Moreover, this erroneous argument by Respondent inadvertently serves to expose still another jurisdictional basis for the exercise of this Court's review powers. Since the federal constitutional problems, as Respondent says, are so clearly answered by the Kentucky law and the Kentucky court rules, the constitutional error involved in such state law answers may be noticed and reviewed under this Court's

"plain error" doctrine. Under that doctrine, this Court "at its option, may notice a plain error not presented" by the parties either in the court below or before this Court. Rule 40(1)(d)(2); see *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313, 320, n.6; *Vachon* v. *New Hampshire,* 414 U.S. 478, 479, n.3.

But this alternative "plain error" doctrine need not be invoked here, since the parties are now in agreement that the federal constitutional issues were raised in and denied by the Court of Appeals of Kentucky, and in light of the federal questions in the Petition the parties are prepared to brief and argue fully the federal constitutional issues.

II

As to the federal constitutional questions at stake, the Respondent concedes (Opp. Br. 15) that the Board of Governors could have finally dismissed the charges against Petitioner, in which event "the case would have terminated without any detriment to petitioner." That power of final termination is precisely why Petitioner should have been given some due process opportunity to urge that the Board so terminate the case. As the Respondent further concedes (Opp. Br. 17), "There is no 'hearing' before the Board."

As to the absence of any kind of evidentiary hearing before the Court of Appeals, the Respondent offers the novel theory (Opp. Br. 16) that "case law" dealing with federal due process requirements "are not applicable to original actions in the judicial branch by the court of highest jurisdiction in a state seeking to discipline officers of the court. . ." If that theory exists,

it certainly is not supported by any decision of this Court. Advancing such a theory merely adds to the substantiality of the due process question and the appropriateness of granting certiorari.

The analogy drawn by Respondent (Opp. Br. 16-17) to disciplinary proceedings before this Court pursuant to Rule 8 also adds fuel to the certiorari fire in this case. The analogy seems faulty if for no other reason than that disbarment by the Kentucky court directly affects the reputation and livelihood of the attorney involved, whereas disbarment by this Court is merely superimposed upon the more drastic state court disbarment—or, indeed, it might be quite independent of state court disbarment and in no way affect the livelihood of the attorney. The due process implications of the disbarment procedures in Kentucky and those before this Court would thus appear significantly different.

It should be noted that presently pending before this Court for decision is No. 74-204, *Mathews* v. *Eldridge,* argued on October 6, 1975. In that case a beneficiary of Social Security disability benefits was given the right to rebut in writing a proposed termination of benefits and to submit additional evidence, but was denied the right to an oral hearing on such termination. The due process right to an oral hearing in that case bears strong overtones to the instant claim that due process requires some sort of an oral hearing before the Kentucky Court of Appeals on the proposed disbarment.*

---

* Respondent asserts (Opp. Br. 18) that Petitioner never requested an oral argument and that there is no rule prohibiting him from so requesting. But Respondent fails to state that there is no rule authorizing an oral argument on request, and that in fact the Court of Appeals has never held an oral argument on a disbarment case. Any such request would have been futile.

III

Finally, the Respondent fails to explain how the Court of Appeals of Kentucky could have found or inferred from the "uncontroverted facts" that the Petitioner "converted his clients' funds to his own use"—which was the critical finding that underlay the disbarment order.

While this is not the forum to retry or review the facts justifying the disbarment order, it is pertinent to note the factual insufficiency underlying the order as an example of the injury that can flow from a denial of a full due process hearing before the Kentucky court.

The only incidents of record concerning Petitioner's dealings with his clients' money were summarized in the Trial Committee's findings (Petition, 9a-10a, Findings 1, 2, and 3). In each of those three incidents, the Petitioner issued one or more checks that were temporarily dishonored. But in each of those three incidents, the Trial Committee found that the client ultimately lost no money and the Court of Appeals did not find otherwise. To wit:

> 1. "The check from the Respondent [Petitioner herein] to Mr. Taylor was dishonored when first presented for payment, but later honored." Petition, 9a.
>
> 2. "The mortgage was paid by Respondent and Mr. Pappas lost no money thereby." Petition, 10a.
>
> 3. "... this check was returned to Mr. Lewis because of insufficient funds being in the account of the Respondent, but later this check was honored." Petition, 10a.

Had Petitioner been given some kind of an oral hearing before the Court of Appeals, dealing with the

evidence and any proposed fact findings of the court, Petitioner might well have convinced the court that such temporarily dishonored checks, however negligently issued, did not and could not result in a conversion of the clients' funds. To impose the drastic sanction of permanent disbarment because of an unproved conversion heightens the need for subjecting Kentucky's disciplinary procedures to the basic demands of procedural due process.

CONCLUSION

For these additional reasons, the Petition should be granted and the judgment below reviewed.

Respectfully submitted,

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